In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 406

YOKOHAMA SPECIE BANK, LTD.
(a corporation),
Petitioner,

vs.

DR. HU SHIH, The Ambassador of the Republic of China to the United States of America,
Respondent.

BRIEF IN BEHALF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

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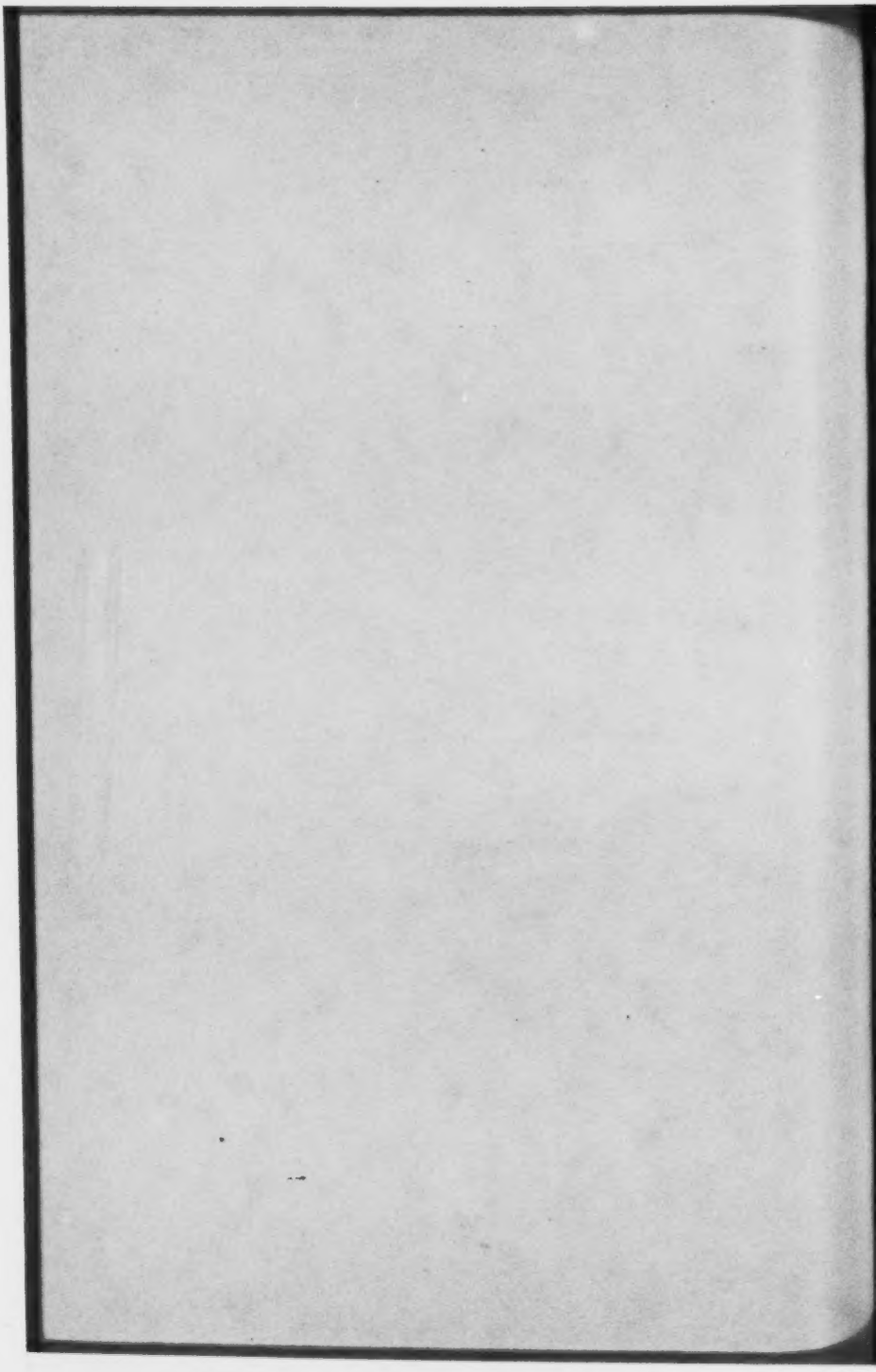

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STATEMENT OF CASE.

Petitioner's statement of the case is correct, with the exception that the interpreter, who was in petitioner's employ, *purportedly,* rather than actually, read the libel to the second officer. The interpreter was not produced at the trial, and the Deputy Marshal did not speak Chinese (R. 92).

The case urged by petitioner is not the one presented by the record. Petitioner contends that the jurisdiction of the District Court attached prior to the expropriation of the vessel by the Republic of China. It is apparent both from an examination of the decision of the Circuit Court of Appeals and the record that the District Court never had jurisdiction over either the vessel or the cargo stowed thereon. The vessel was not a party to the cause. The Marshal never attempted to seize it. Furthermore, the Court never acquired jurisdiction over the cargo because the Marshal, acting under instructions from petitioner, did not take the requisite steps for the Court to acquire jurisdiction. Inasmuch as the Court had neither jurisdiction over the ship nor the cargo, it could not control the movements of the vessel or its gear in the face of the claim of sovereign immunity asserted by the Republic of China after it had expropriated the vessel validly.

An examination of the decision of the Circuit Court of Appeals shows clearly that it is in accordance with the decisions heretofore rendered by this Court. The decision is not in conflict with the decisions of this Court or of any Circuit Court and it involves no unusual or important point.

Petitioner attempted to gain possession of a cargo of scrap iron stowed on board a vessel owned by a friendly foreign power. Furthermore, petitioner sought to control the movements of that vessel, to interfere with its management, and to use its gear and equipment for its own purposes.

ARGUMENT.

I. A NATIONAL VESSEL OF A FRIENDLY FOREIGN SOVEREIGN IS NOT SUBJECT TO THE JURISDICTION OF THE COURTS OF THE UNITED STATES.

It cannot be disputed that a national vessel of a friendly sovereign is not subject to the jurisdiction of the Courts of the United States, and is entitled to claim immunity.

Berizzi Brothers Co. v. Steamship "Pesaro", 271 U.S. 562, 70 L. Ed. 1088.

Even though appellant was the legal owner of the cargo, it had no right to enforce its possession by a decree from a United States Court, if it could not gain possession without interfering with the movements of a national vessel of a friendly foreign sovereign.

In *The Siren*, 7 Wall. 152, 19 L. Ed. 129, the Supreme Court said (pp. 156-8):

> "The inability to enforce the claim against the vessel is not inconsistent with its existence.
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> * * * * * * *
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> Even where claims are made liens upon property by statute, they cannot be enforced by direct suit, if the property subsequently vest in the government.
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> * * * * * * *
>
> A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the government, incapable of enforcement by legal proceedings.
>
> * * * * * * *
>
> The authorities to which we have referred are sufficient to show that the existence of a claim,

and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings."

II. THE VESSEL WAS NOT WITHIN THE JURISDICTION OF THE COURT.

Petitioner recognizes that the vessel was expropriated validly by the Republic of China, but contends that the jurisdiction of the District Court had attached prior to the expropriation, and therefore the Republic of China was not entitled to assert its claim of sovereign immunity to prevent the District Court from controlling the movements of the ship and its gear.

Actually, as pointed out by the Circuit Court of Appeals the vessel was never within the jurisdiction of the District Court, because it was not a party to the cause and the Marshal had never attempted to seize it.

Petitioner subtly interweaves in its argument, without the citation of a single authority, the contention that the Court had jurisdiction over the "Kwang Yuan", because of the purported seizure of the cargo.

It is elementary that, without a seizure, the vessel was not in the possession of the Court, or under its jurisdiction, and therefore the Court could not control its movements or its equipment.

In *Criscuolo v. Atlas Imperial Diesel Engine Co.*, 84 F. (2d) 273 (C.C.A. 9), the Court said (p. 275):

> "To obtain jurisdiction to proceed to a decree in rem in admiralty, there are two essential requirements. First, the vessel must come into the possession of the court by seizure under adequate warrant of arrest."

In the instant case the *vessel* was not in the possession or under the jurisdiction of the Court at the time the "Kwang Yuan" was expropriated and therefore no conflict ever arose between the jurisdiction of the Courts of the United States and the sovereignty of the Republic of China. The claim of sovereign immunity arises not as to the cargo but as to the vessel. The vessel having been expropriated, and the decree of expropriation having been effected by the acquiring of possession of the vessel, peaceably and without conflict with any jurisdiction of the Court, expropriation became complete. After the act of expropriation, the Court could not interfere with the possession of a friendly foreign sovereign.

III. THE CARGO WAS NOT WITHIN THE JURISDICTION OF THE COURT.

However, the Court did not have jurisdiction even over the cargo of scrap iron because the Marshal did not make any seizure of the cargo or take it into his possession. From the record, it is clear that the Deputy Marshal merely went on board the ship, handed the monition to the second officer, tacked a copy on the saloon bulkhead, listened while an alleged in-

terpreter (hired by petitioner) purportedly read the monition to the second officer (R. 84, 92), and then left the vessel. The Deputy Marshal did not see the cargo (R. 93) and did not attempt to exercise any control over it or attach a copy of the monition in the vicinity of the holds where the cargo was stowed (R. 90-1, 93). The Deputy Marshal did not even ascertain that there was any cargo on board (R. 93). No keeper was left on board (R. 91) and none of the ship's officers or crew was placed in charge of the cargo as the representative of the Marshal. Nothing whatever was done by the Deputy Marshal to exercise possession or control over the cargo.

Admiralty Rule 10 of the United States Supreme Court (28 U. S. C. A. 723, p. 393) and Admiralty Rule 9 of the Rules of Practice of the United States District Court, for the Northern District of California, provide in part as follows:

> "In all cases of seizure, and in other suits and proceedings in rem, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, * * *."

Webster's New International Dictionary, Second Edition, defines "seizure" as "a taking into possession".

Here the Marshal did not take the scrap iron into possession in the remotest degree.

In *The Rio Grande,* 23 Wall. 458, 23 L. Ed. 158, the Supreme Court said (p. 464):

> "* * * it follows that to give jurisdiction *in rem* there must have been a valid seizure and an actual control of the ship by the marshal of the Court; * * *."

In *Taylor, et al. v. Carryl,* 20 How. 583, 15 L. Ed. 1028, the Court said (pp. 599-600):

> "But it follows, that to give jurisdiction *in rem,* there must have been a valid seizure and an actual control of the ship by the marshal of the court, and the authorities are to this effect."

In *Pelham v. Rose,* 9 Wall. 103, 19 L. Ed. 602, the Court said (p. 106):

> "The seizure of the property, as thus seen, is made the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture. Now, by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody."

In *Bruce v. Murray,* 123 F. 366 (C.C.A. 9), the Court said (p. 371):

> "To give jurisdiction in rem the subject proceeded against must be within the jurisdiction of the court, and there must be an actual seizure and control of the res by the marshal; otherwise, the admiralty court has no jurisdiction."

In *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652, Justice McKenna, in a concurring opinion, said (p. 80):

> "It is said 'a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner.' "

In *Brennan v. Steam-Tug Anna P. Dorr,* 4 F. 459 (W. D. Pa.), the Court said (pp. 459-62):

> "The facts of the case, as they now appear to the court, are as follows: On October 27, 1875, Patrick Brennan, an owner of the one-fourth of said tug, filed a libel *in rem* for her sale, and the division of the proceeds between himself and his co-owners, Christian & Carse. To the process which then issued the marshal made a return in these words: 'November 3, 1875, attached the steam-tug Anna P. Dorr, her tackle, apparel, furniture, etc., by serving a copy of this writ, personally, on John Carse, part owner of same, and by serving, November 5, 1875, a copy of this writ at residence of Capt. E. F. Christian on wife.'
>
> * * * * * * *
>
> From the evidence now before the court it appears that the marshal did not arrest or take possession of the tug by virtue of said process. He was instructed by the libellant's proctors not to arrest her, but simply to serve a copy of the writ upon Christian & Carse, and these instructions he obeyed. At the time the libel was filed the tug was in the possession of Christian, and she remained in his possession as fully after the service of the writ as before; and down until May 12,

1877, the tug was run by Christian in and about the harbor of Erie, and upon the lake, in her ordinary business. During all this time no further step was taken in this suit.

* * * * * * *

In *Miller v. United States,* 11 Wall. 294, it is said: 'In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is *in rem.* In most of such cases the *res* is movable personal property, capable of actual manucaption. Unless taken into actual possession by an officer of the court, it might be eloigned before a decree of condemnation could be made, and thus the decree would be ineffectual. It might come into the possession of another court, and thus there might arise a conflict of jurisdiction and decision if actual seizure and retention of possession were not necessary to confer jurisdiction over the subject.'

In the present case it is certain that there was no actual seizure of the tug by the marshal under the original process issued out of this court. Acting in accordance with the express instructions of the libellant the marshal did not seize the tug, but, with the acquiescence of all the parties in interest, she remained in the possession of Christian. Of this, I may here say, none of the owners, under the circumstances of the case, have any right to complain.

But it is said that the marshal's return shows an attachment of the vessel. I do not think so. True, the language of the return is, 'attached the steam-tug Anna P. Dorr.' But how? 'By serving a copy of this writ personally on John Carse,

> part owner of same, and by serving, November 5, 1875, a copy of this writ at residence of Captain E. F. Christian on wife.' But such service of the writ was not an attachment or seizure of the vessel."

In *The Merrimac,* 242 F. 572 (S. D. Fla.), the Court said (p. 574):

> "It is beyond question, I imagine, as said by Judge Locke, in The Nora (D. C.), 181 Fed. 845, that 'the jurisdiction in actions in rem is only given by attachment and bringing the vessel into the custody of the court, and no valid decree can be entered without such attachment.' In the instant case, as above noticed, no attachment was ever served. The vessel was never taken into custody, and hence no decree *in rem* could be entered in this suit."

Since the District Court did not have possession of the *vessel* at any time under any theory, the District Court had no power to order the "Kwang Yuan" moved after it had been expropriated and the claim of sovereign immunity had been asserted.

The cases cited in petitioner's brief are not in conflict with the above authorities. The majority of petitioner's authorities fall into two classifications: First, those in which the goods, at the time of the seizure, were already in the possession of a public official; in this class are *250 Tons of Salt,* 5 F. 216 (S.D.N.Y.), and *Jorgensen v. 3173 Casks of Cement,* 40 F. 606 (E.D.N.Y.); and, second, those in which the marshal *originally* had possession of the property and the

Courts held merely that the "continuance of possession" did not affect the validity of seizure. Such cases are *The E. W. Gorgas,* 8 Fed. Cas. No. 4585 (1879 S.D.N.Y.); *United States v. The Little Charles,* 26 Fed. Cas. No. 15,612 (1818 Circ. Ct. D. Va.), *The Circassian,* 5 Fed. Cas. No. 2721 (1866, 1867 E.D.N.Y.) and *The Joseph Gorham,* 13 Fed. Cas. No. 7537 (1843 D. Conn.).

In *The C. W. Cowels,* 124 F. 458 (N.D. Ia.), it appears that the marshal appointed the tow boat captain as his *agent,* and the Court held that the tug remained in the marshal's possession although under the control of his agent. The case is of no help in the instant matter.

It does not appear from the decision of *The Whippoorwill,* 52 F. (2d) 985 (D. Md.), that the question involved here was raised in that case. How the Court would have decided the point, if it had been urged, is mere conjecture. Therefore, the case is not an authority for the proposition stated by petitioner.

The Court, having no jurisdiction over the ship or cargo, was unable to make any valid order in the cause even if respondent had not asserted the claim of sovereign immunity. Certainly when the Republic of China intervened and set up this defense, the Court could not order the vessel moved and its gear and equipment used to unload the cargo.

Finally, petitioner contends that the doctrine of sovereign immunity should not be applied to this case because the sovereign's possession and control will be

disturbed only slightly. The rule is not so limited. The sovereign, under the decisions, is entitled to absolute immunity. Any order of the United States Courts that would interfere with the movements of a national vessel or would order the Marshal to move the vessel and use its equipment would interfere with the sovereign rights of a friendly foreign power.

As the United States District Court said in *The Luigi,* 230 F. 493 (E.D. Pa.) at page 496:

> "It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, * * * than it is to take cognizance of private rights, if, by so doing, that rule is violated."

It is respectfully submitted that the application for certiorari should be denied.

Dated, San Francisco, California,
October 4, 1940.

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